In the High Court of Judicature at Madras

Dated: 11.04.2007

Coram

The Hon'ble Mrs. Justice PRABHA SRIDEVAN

Second Appeal No.953 of 1995

1. Govindaraja Naidu
2. Thayarammal .. Appellants/Defendants

vs.

1. Meenatchi Sundaram
2. Rajaram
3. Pandurangan .. Respondents (Plaintiffs)

Prayer:- Appeal filed under Section 100 CPC against the judgment and decree dated 22.12.1994 made in A.S.No.41 of 1993 on the file of the Additional District Judge, Pondicherry, at Karaikkal confirming the against the judgment and decree dated 16.3.1993 made in O.S.No.24 of 1992 on the file of the Principal District Munsif, Karaikal.

For Appellants : Mr. S.Sounthar
For Respondents : Ms. R.T.Shyamala

J U D G M E N T

Under Section 100 Civil Procedure Code, the scope of interference is very limited. However, when both the Courts below have declared the title in favour of a person on the basis inter alia of a sale deed executed by a person, who had no authority to do so; and a Will which is not proved by examining the attesting witnesses; then the matter will have to be examined with great care and caution.

2. The first respondent herein filed the suit for declaration of his title and for possession of the property. The first respondent claims his title from the legal heirs of one Balaguru Chettiar. Balaguru chettiar is the son of one Govindasamy Chettiar. The father of the second appellant viz., Kaliaperumal is the brother of Govindasamy Chettiar. The property originally belonged to one Sowriraja Chettiar, who died in 1941. His wife Krishnammal died in 1977 issueless.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Sowriraja Chettiar executed a Will dated 22.07.1934, Ex.A11, bequeathing his properties including the suit property in favour of Balaguru Chettiar. The Will was notarised in accordance with French law and the same is not in dispute. Balaguru Chettiar died in 1983 leaving behind him his surviving heirs, his wife Rukmani Ammal, son Aravindan and daughter Usha Krishnan. According to the plaintiff, these three heirs of Balaguru Chettiar appointed one Janakalakshmi as their power of attorney agent for selling the properties of Balaguru Chettiar and the said power agent executed Ex.A1 sale deed dated 22.12.1986 in favour of the plaintiff. The narration of events in the plaint shows that the sale deed dated 22.12.1986 was full of errors and therefore, many rectification deeds had to be executed. Initially, it was found that while tracing the title of the property, it was mentioned that the property had been bequeathed to Aravindan under a Will executed by Krishnammal, wife of Sowriraja Chettiar. It was discovered that this was a mistake because the property had actually devolved on Balaguru Chettiar under Ex.A11 Will. Therefore, a rectification deed was executed on 16.05.1988 by the said power agent in favour of the plaintiff. Thereafter, it was discovered that there was a mistake of fact by mentioning that the property had devolved on Aravindan on the death of his father Balaguru Chettiar instead of stating that the property had devolved on all the three legal heirs. Therefore, another rectification deed was executed on 19.04.1991, by which it is alleged that the other legal heirs had acknowledged the right, title and interest of the plaintiff. Therefore, according to the plaintiff, by virtue of the sale deed dated 22.12.1986, Ex.A1 and the rectification deeds, Exs.A2 and A3, he had obtained a valid title. It is stated in the plaint that since Thayarammal, the second defendant, was closely related to Sowriraja Chettiar, she was permitted to occupy the property and when she was called upon to vacate the suit property by the legal notice dated 30.11.1987, she sent a reply raising untenable grounds and hence, the suit was filed.

3. The appellants denied the title of the respondent. According to them, they are in possession of the back portion of R.S.No.121/310. It was specifically stated that the derivation of title through the alleged power of attorney is not correct and therefore, Ex.A1 is not valid. In paragraph 5, it was stated that the so called power agent who executed Ex.A1 in fact did not have any power and the respondent/plaintiff was called upon to produce the alleged power of attorney said to have been executed by the said Aravindan. It is also claimed inter alia that on the death of Sowriraja Chettiar, the property had reverted to his brother Kaliaperumal and therefore, Kaliaperumal became the legal heir entitled to the estate of the deceased Sowriraja Chettiar and thereafter the second defendant, who is the daughter of Kaliaperumal, was in possession of the suit

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

property as absolute owner. Sowriraja Chettiar's Will was also denied. It was also specifically stated that the document of consent cannot convey any title, especially when there is nothing to show that consideration passed under the same. The documents filed by the respondent/plaintiff to show possession were all attacked on the ground that they were subsequent to the legal notice. A mention was made in the written statement about the recital in the plaintiff's document to a Will said to have been executed by Balaguru Chettiar on 10.5.1983. The suit was also resisted on the ground of limitation. A reply statement was filed by the respondent, in which, apart from stating that the consent deed was validly conveyed title, the attack on the power of attorney deed and the lack of capacity of the power of attorney agent to convey title had not been met.

4. The trial Court decreed the suit. Aggrieved by which, the defendants/appellants preferred an appeal and the lower appellate Court dismissed the appeal. Hence, the present second appeal has been filed and the following substantial questions of law have been raised:

> 1. Whether Ex.A15 is valid in the eye of law in the absence of examination of even one of the attestors to the Will, the mandatory requirement under Section 68 of the Evidence Act?
>
> 2. Whether the mere entry in the land acquisition records is sufficient in the eye of law to prove the hardship of Balaguru Chettiar, especially in the absence of production of birth certificate, voters list, school records etc.?
>
> 3. Whether the Courts below erred in relying on Ex.A15 overlooking the contradictory stands of the plaintiff?
>
> 4. Whether the consent deed dated 19.4.1991 can legally convey title to the plaintiff?
>
> 5. Whether the plaintiff proved that his vendors are the legal heirs of Balaguru Chettiar in the light of Section 32 of the Evidence Act?"

5. The learned counsel for the appellants submitted that Ex.A15, the Will said to have been executed by Balaguru Chettiar in favour of Aravindan cannot be said to have been proved since it has not been proved in accordance with law. None of the attestors has been examined and merely because it is registered, the Will cannot be said to be proved. The learned counsel for the appellants submitted that the respondent had not pleaded that Aravindan derives title under the Will and without any

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

pleading, this document cannot be accepted as a source of title for the respondent/plaintiff. The learned counsel would strenuously submit that the execution of power of attorney appointing Janakalakshmi as power agent was subsequent to the sale deed and therefore, the respondent derives no title under Ex.A1.

6. The learned counsel for the respondent/plaintiff would submit that the appellants cannot attack Ex.A11, the Will executed by Sowriraja Chettiar in favour of Balaguru Chettiar. It had been notarized and therefore, the production of the same would show that there was a Will and that it is proved in accordance with law. The learned counsel submitted that the respondent do not really rely on Ex.A15. Ex.A15 came up for consideration by the Courts below only because the appellants/defendants mentioning the same in the written statement. The respondent rests his title on the ground that Balaguru Chettiar, to whom the property was bequeathed by Sowriraja Chettiar under Ex.A11, left behind him surviving three legal heirs viz., his widow, son and daughter and the respondent, having purchased the property under the sale deed executed by the power of attorney agent of these legal heirs, is entitled to have his title declared. The learned counsel has also submitted that the sale deed mentions the power of attorney executed by Aravindan in Singapore, which has been registered in India as Document No.18/86 and therefore, Janakalakshmi as his power of attorney had executed the sale deed in favour of the respondent and the persons who can attack the sale deed are the other legal heirs, who had given their consent and therefore, it is not for the appellants to challenge the title of the respondent. The learned counsel has also submitted that the question whether the power of attorney deed, which was executed subsequently can validly convey title to the plaintiff, was not raised as a substantial question of law and cannot be raised now.

7. The trial Court framed as many as eight issues including the validity of the power deed. It has found in favour of the respondent on the issue of limitation. The trial Court also found that the vendors of the plaintiff are the legal heirs of the said Balaguru Chettiar. Ex.A11, the Will of Sowriraja Chettiar was accepted and Ex.A12, the power of attorney executed by Usha Krishnan and Ex.A13, the power of attorney executed by Aravindan were also accepted. The trial Court recorded that the defendants viz., the appellants had admitted that the plaintiff had purchased the suit property. This finding is clearly wrong since it is the consistent case of the appellants that the plaintiff viz., the respondent did not get a valid title under Ex.A1. It is difficult to understand what the trial Court means when it observes "the defendants had admitted that the plaintiff

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

purchased the suit property under Ex.A1, but they have raised strong objection only to the effect that the sale deed is not valid in law." If the sale deed is attacked as invalid, then the conclusion is that the plaintiff did not get a valid title under Ex.A.1. Thereafter, the trial Court upheld the validity of Ex.A1 as it was not questioned before any Court of law and therefore it is binding on the defendants and that the defendants had themselves admitted that they are not the owners of the suit property and they are claiming ownership only by adverse possession and since the documents filed by the defendants do not support their case that they are owners of the suit property, the trial Court erroneously came to the conclusion that the plaintiff has proved his title. The manner in which the issues raised have been dealt with by the Trial Court leaves a lot to be desired.

8. The appellate Court came to the conclusion that Ex.A15, the Will said to have been executed by Balaguru Chettiar in favour of Aravindan is valid because it is registered and since Aravindan had executed a power of attorney in favour of Janakalakshmi, the respondent's title cannot be questioned. According to the appellate Court, Ex.A3, consent deed, was obtained as a precautionary document and the appellants have no locus standi to question the same. I am at a loss to understand as to what is meant by this. On the basis of the above discussion, the appellate Court also came to the conclusion that the plaintiff has proved his title and dismissed the appeal.

9. The invalidity of the power of attorney has been raised by the appellants right from the beginning. Therefore, it is not as if the appellants sprang a surprise on the respondent at the stage of the second appeal and the substantial question of law framed at the time of admission also refers to the question whether the plaintiff has proved that his vendors are the legal heirs of Balaguru Chettiar and whether under the consent deed a valid title can be conveyed to the plaintiff. The more important substantial question of law regarding the manner in which Ex.A15 was held to be proved has also been raised. It must be remembered that the appellate Court declared the title of the plaintiff on the basis of Ex.A15 under which Aravindan is said to have bequeathed the property by his father Balaguru Chettiar. Ex.A.15 even though a registered Will will have to be proved by examining the attestors and since they have not been examined, Ex.A15 cannot be said to have been proved in the eye of law - vide Janki Narayan Bhoir vs. Narayan Namdeo Kadam, reported in 2003 2 SCC 91, wherein the Supreme Court has held as follows:

> "Evidence Act, 1872:- S.68 - execution of Will required by S.63 of Succession Act to be attested by two or more witnesses - One of the two attesting

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

witnesses can be examined even though the other one is available, but he must prove due execution of the Will as required under Section 63(c) of Succession Act i.e. attestation by him as well as by the other witness in the manner contemplated therein - if one witness fails to prove the same, the other witness has to be called for supplementing his evidence."

In any event, the learned counsel for the respondent herself would submit that the respondent does not rest his case on Ex.A15 Will. Finally, Ex.A1 is the basis on which the appellate Court has confirmed the decree of the trial Court. Ex.A11, which is the Will executed by Sowriraja Chettir in favour of Balaguru Chettiar, is admitted to be a valid Will by the counsel for the appellants, which is beyond the pale of controversy.

10. Now, we have to see whether any title was conveyed to the respondent under Ex.A1. Ex.A1 is dated 22.12.1986. Ex.A1 mentions that Balaguru Chettiar's son Aravindan had executed a power of attorney on 22.4.1986, which had been stamped under the Indian Stamp Act and registered as Document No.18/86, but this document has not been produced before the Court. The sale deed viz., Ex.A1 is only a registered copy and not the original sale deed. In the evidence, the respondent has stated that the original sale deed has been deposited in a bank, no details are given as to which bank it has been deposited and for what purpose. The plaintiff was also asked as to whether Janakalakshmi, the power agent, who has sold the property to him, is still alive and he admits that she is alive and there is no enmity between them, but still Janakalakshmi has not been examined by the respondent. When serious doubts are cast by the appellants on the power of attorney agent to convey a valid title, it is the duty of the respondent to dispel these doubts by examining her. He has failed to do that. On 16.5.1988, a rectification deed is allegedly executed by Janakalakshmi to set right the factual mistake that Krishnammal left a Will. This document is Ex.A2. On 19.4.1981 another rectification deed is filed to rectify the factual mistake that the property had devolved on all the three legal heirs and not on Aravindan alone. This is Ex.A3. The fact that so many rectification deeds had to be executed itself throws doubt as to whether the power of attorney agent was even aware of the factual position when she is said to have executed the sale deed in favour of the plaintiff. In fact, on the date when the sale deed Ex.A1 was executed, it is extremely doubtful whether Janakalakshmi had any authority to execute the sale deed. Two years thereafter Exs.A12 and A13 have been executed by the legal heirs of Balaguru Chettiar on 21.4.1988 and 4.4.1998 respectively. A perusal of these two documents would show that the principals viz., Rukmani Ammal, Usha Krishnan and Aravindan were not even

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

aware that two years prior to that Ex.A1 had been executed by Janakalakshmi. The recitals in Ex.A1 would indicate that they the principals, are still owners of the property and they are granting power empowering the power agent to sell the suit property. If, in fact, there had been a power of attorney executed by Aravindan in Singapore, which has been subsequently stamped and registered in India that should have been found mention in Ex.A13, which is the power of attorney deed executed by Aravindan and his mother. While Ex.A13 mentions about the Will executed by Sowriraja Chettiar, it is silent about the Document No.18/86, which is mentioned in Ex.A1. Both the non production of the power of attorney deed Document No.18/86 in spite of the defendant/appellant calling upon the respondent to produce the same and non mention of the same by Aravindan throws a doubt as to whether there was a Document No.18/86. The fact that the original sale deed was not produced by the respondent in the Court and only a registered copy has been produced, throws a considerable doubt regarding the title.

11. It was strongly urged by the learned counsel for the respondent that when the other legal heirs of Balaguru Chettiar had given their consent to the transaction, then it is not for the appellants to challenge the title of the respondent. Had Ex.A15 been proved in accordance with law and the title of Aravindan to the property had been established in a manner known to law and if the power of attorney deed Document No.18/86 had been produced into Court to show that on the date of Ex.A1 Aravindan had given Janakalakshmi the power to execute the sale deed, then Ex.A1 would have conveyed title to the plaintiff and Aravindan, his mother and sister's consent could have been utilised by the respondent to remove any possible future disputes which may be raised by Usha Krishnan and Rukmani ammal, the sister and mother of Aravindan. But, in this case, Ex.A15 has not been proved and the plaintiff in fact claims that he has purchased the suit property from the power agent of the three legal heirs. Therefore, even if Aravindan had indeed executed Document No.18/86 and produced the same into Court, the agent Janakalakshmi could have conveyed only 1/3rd share in the property. By merely giving consent to the sale deed, the owners of the other 2/3rd share could not have conveyed any title to the plaintiff without executing a sale deed in favour of the plaintiff. But, in this case, that situation does not arise, since the power of attorney given by Aravindan has not been produced before the Court and as on the date of Ex.A1, the vendor of the respondent was not a duly appointed power agent of the legal heirs of Balaguru Chettiar and therefore, no valid title could have been conveyed to the respondent. The question whether the second appellant is the actual daughter of Sowriraja Chettiar's brother and the other issues hardly arise for consideration. The plaintiff has to succeed on the footing of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the documents produced by him and the oral evidence. He fails miserably for the following reasons:

a) Ex.A15, the Will has not been legally proved.

b) On the date of Ex.A1, Janakalakshmi had no authority to execute the sale deed.

c) When serious doubts were cast on the validity of the power of attorney, non-examination of Janakalakshmi is fatal.

d) Co-owners cannot convey a title of their share by consenting to the sale deed by one co-owner.

12. The Supreme Court dealt with the similar circumstance in Hero Vinoth vs. Seshammal, reported in 2006 (5) SCC 545. The relevant portion is extracted hereunder:

> 19. . . . The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.
>
> 24. ... (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.
>
> 25. In the case at hand the High Court found that the approach of the trial court and the first appellate court was erroneous inasmuch as they proceeded on the basis as if it is a case of easement of necessity. Had the trial court and the first appellate court considered the evidence in the light of the respective stands of the parties and then concluded one way or the other, the position would have been different. When the approach was fundamentally wrong the High Court cannot be faulted for having gone into the question as to what was the proved intention of the party as culled out from the partition deed.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

13. In the result, the substantial questions of law are answered in favour of the appellants. Consequently, the second appeal is allowed and the judgments and the decrees of the Courts below are set aside. There shall be no order as to costs.

ATR

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional District Judge,
   Pondicherry. At Karaikkal

2. The Principal District Munsif,
   Karaikkal

3. The Section Officer
   V.R. Section, High Court, Madras.

+ one cc to Mr. S. Sounthar, Advocate sr on. 23825
+ one cc to Mrs. R.T. Shyamala, Advocate sr on. 23432

pv(co)
nm(10.05.07)

S.A.No.953 of 1995

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/